Church Homes, Inc. d/b/a Avery Heights *and* New England Health Care Employees Union, District 1199, Service Employees International Union.[1]
Case 34–CA–9168

June 29, 2007

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On December 16, 2004, the National Labor Relations Board issued its Decision and Order in this proceeding finding, among other things, that the Respondent did not unlawfully fail to reinstate permanently replaced economic strikers upon their unconditional offer to return to work, because there was no showing that the Respondent had an independent unlawful motive in hiring the permanent replacements.[2] The Union[3] filed with the United States Court of Appeals for the Second Circuit a petition for review of the Board's Order insofar as it dismissed that allegation.

On April 19, 2006, the court granted the Union's petition for review, vacated the Board's decision, and remanded the case to the Board for further proceedings consistent with the court's opinion.[4]

By letter dated September 19, 2006, the Board notified the parties that it had decided to accept the court's remand and invited them to file statements of position with respect to the issues raised by the court's opinion. The Respondent, the General Counsel, and the Union each filed a statement of position.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

We have reviewed the entire record in light of the court's remand, which constitutes the law of the case. We find, based on that remand, that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate the permanently replaced economic strikers upon their unconditional offer to return to work.

[1] We have amended the caption to reflect the disaffiliation of the Service Employees International Union from the AFL–CIO effective July 25, 2005.

[2] 343 NLRB 1301 (2004). Member Walsh, dissenting in part, found that the General Counsel had proved unlawful motive, and thus that the Respondent violated Sec. 8(a)(3) and (1) of the Act by failing to reinstate the permanently replaced strikers upon their unconditional offer to return to work.

[3] New England Health Care Employees Union, District 1199, Service Employees International Union.

[4] *New England Health Care Employees Union, District 1199, SEIU v. NLRB*, 448 F.3d 189 (2d Cir. 2006).

Background

The pertinent facts are as follows. During negotiations for a successor contract, the Union commenced an economic strike on November 17, 1999. Virtually all of the approximately 180 unit employees participated in the strike.

On about December 15, 1999, the Respondent began hiring permanent replacements for the striking employees. As found by the court, the Respondent "made a conscious decision to tell the Union nothing about the hiring of permanent replacements" and "took active measures to keep the replacement campaign a secret while hiring as many permanent workers as it could before the Union caught on." *New England Health Care Employees Union, District 1199, SEIU v. NLRB*, supra at 190.

The Union learned about the Respondent's hiring of permanent replacements in late December. The Union then arranged for a meeting with the Respondent on January 3, 2000, during which the Respondent admitted having hired "over 100" permanent replacements for striking employees. Id.

On January 20, 2000, the Union made an unconditional offer to return to work on behalf of the strikers. In response, the Respondent began recalling strikers to the positions that it had not yet filled with permanent replacements, ultimately reinstating about 78 employees.

The Union filed an unfair labor practice charge. The General Counsel issued a complaint, alleging that the Respondent had violated Section 8(a)(3) and (1) of the Act by refusing to reinstate the economic strikers as of January 20.

The administrative law judge found the violation, concluding that the secret hiring of the permanent replacements was motivated by the desire to punish the strikers and break the Union's solidarity. The Board reversed the judge, finding that the General Counsel had failed to demonstrate that the Respondent acted with an independent unlawful purpose in hiring the permanent replacements. In particular, the Board found that the Respondent's failure to disclose the hiring of permanent replacements was not evidence of an illicit motive, inasmuch as the Respondent had no legal obligation to make that disclosure. *Avery Heights*, supra at 1306–1307.

The Decision of the Second Circuit Court of Appeals

On review, the court acknowledged the settled principle that an employer may hire permanent replacements for economic strikers and need not discharge those replacements if the strikers make an unconditional offer to return to work. Supra at 192. The court further held, however, that the Act is violated where "'an independent

unlawful purpose' motivated the hiring of permanent replacements." Id., citing *Hot Shoppes, Inc.*, 146 NLRB 802, 805 (1964).

The court found it unnecessary to determine whether there was such an unlawful purpose in this case. Instead, the court held that the Board erred in concluding that because an employer is not obligated to notify strikers before hiring permanent replacements, the Respondent's secrecy in hiring such replacements was not probative of an independent unlawful purpose. Supra at 195.

The court concluded that the Board's failure to consider the purpose behind the Respondent's secrecy was problematic because, in the court's view, the "natural and logical" implication of the facts the Board credited was that the Respondent's secrecy was illicitly motivated:

> [L]ogic suggests that an employer seeking to enhance its bargaining leverage by hiring permanent replacements would have every incentive to publicize the effort, and that an employer seeking only to prolong its ability to withstand the strike would be indifferent to whether the strikers and the union knew what it was doing.
>
> Conversely, it would appear that employers with an illicit motive to break a union have a strong incentive to keep the ongoing hiring of permanent replacements secret . . . [to gain] enough time to establish an employment relationship with a large number of permanent replacements *before* the union can react by offering to return to work[.] Supra at 195–196 (emphasis in original).

Given what the court determined were the logical implications of the Respondent's secrecy, and the Board's failure to consider the purpose of that secrecy, the court concluded that there was "no apparent basis for the Board's conclusion that 'the nondisclosure did not have an illicit motive.'" Supra at 196 (quoting 343 NLRB at 1307). The court accordingly granted the Union's petition for review and remanded the case to the Board.

In its remand, the court was careful to explain that it was not deciding whether the Respondent had an unlawful independent purpose for hiring permanent replacements. Thus, in remanding the case, the court observed that the Board might:

> decline to accept the ALJ's negative credibility finding with respect to the evidence that [the Respondent] submitted suggesting that fear of picket line violence motivated its decision to keep secret the hiring of permanent replacements (provided the record supports such a reversal . . .).

Supra at 196 fn. 7.[5] The court also cited additional evidence that the Respondent argued "might suggest that it did not possess an independent unlawful motive" in hiring the permanent replacements, including that the Respondent: (1) demonstrated an ongoing willingness to negotiate a contract with the Union; (2) agreed to a request by the Mayor of Hartford that it stop hiring additional permanent replacements while his strike mediation efforts were ongoing (despite having unprocessed job applications); and (3) solicited the Union's input on how best to recall strikers who had not been permanently replaced to available positions, and then followed the Union's suggestions. Supra at 196 fn. 7.

Discussion

We have accepted the court's remand, and recognize—as the law of the case—the court's finding that the logical implication of the Respondent's secrecy was an illicit motive.[6] Having reviewed the record, including the facts

[5] The court stated that a fear of picket line violence, if proven, could constitute a legitimate explanation for the Respondent's secrecy. Supra at 195.

[6] The court did not explicitly place the burden of proof on the Respondent to establish a lawful motive for secrecy in the hiring of the replacements. However, the court did say that the "natural and logical" implication of the facts is that the secrecy was unlawfully motivated. The court also said that employers with an unlawful motive would do what the Respondent did here, i.e., keep secret the hiring of replacements. In view of these pronouncements, it would appear that the court placed on the Respondent the burden of establishing a lawful motive for maintaining secrecy in the hiring of replacements.

Chairman Battista and Member Schaumber respectfully disagree with the Second Circuit in this respect. The General Counsel bears the burden of proving by a preponderance of the evidence that an unfair labor practice has occurred, including proving unlawful motive. *Wright Line*, 251 NLRB 1083, 1088 fn. 11 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See Sec. 10(c) of the Act (violations may be found only "upon the preponderance of the testimony taken"). Although the court agreed with the Board that an employer has no duty to disclose to a union its intention to hire permanent replacements, supra at 195, the court's decision suggests that unlawful motive may be inferred solely from an employer's secrecy in hiring permanent replacements. In the view of Chairman Battista and Member Schaumber, that inference effectively relieves the General Counsel of the burden of establishing unlawful motive and improperly shifts the burden of proof to the employer to establish that it acted with a lawful motive.

Chairman Battista and Member Schaumber believe that there can be a number of valid reasons for secrecy. They agree that the employer is in the best position to present any such reasons, and thus they believe that the employer has the duty to go forward with any such reasons. However, they do not agree that the burden of persuasion shifts away from the General Counsel. Nevertheless, Chairman Battista and Member Schaumber recognize that they are bound by the court's opinion as the law of the case.

Contrary to his colleagues, Member Walsh fully agrees with the Second Circuit. As he stated in his original dissent, although the Respondent may not have had a duty to notify the Union before hiring permanent replacements, "the fact that [the Respondent] was willing to go to great lengths to conceal its intentions" is probative of whether

highlighted by the court, we find that the record is insufficient to refute the inferred unlawful motive. Accordingly, we find that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate the permanently replaced economic strikers upon their unconditional offer to return to work.

The Respondent's Discredited Testimony Concerning Fear of Picket Line Violence

At the hearing before the administrative law judge, the Respondent's administrator, Dr. Miriam Parker, testified that she had heard of a number of incidents of strike-related violence. She testified that she kept secret the hiring of permanent replacements because she feared that the Union would engage in additional violence and other misconduct to impede the Respondent's efforts to recruit replacement employees. None of the Respondent's other management personnel so testified.

The judge discredited Parker's testimony based on his evaluation of her demeanor and the absence of evidence corroborating her claimed fear of violence. See supra at 1317, 1333. The judge explained:

> The only evidence in support of [Parker's] claim was hearsay. Although there was a police presence throughout the strike and videotape evidence of supposedly inappropriate conduct on the picket line, the record here is devoid of police reports, tapes, or any other evidence to show that the Respondent had a good faith concern that it would not be able to hire permanent replacements in sufficient numbers to continue operations if the Union was aware of its plans. [Supra at 1333.]

We affirmed this credibility determination in the underlying decision. On remand, we having carefully reviewed the record, and we reaffirm that finding as consistent with the record as a whole. As found by the judge, Parker was not credible and the record is devoid of evidence that would lend credence to Parker's claim. Indeed, other record evidence undercuts her claim. Thus, in the December 31, 1999 confidential memorandum from the Respondent's chief executive officer, Norman Harper, to the Respondent's board of directors regarding the advantages of hiring permanent replacements, and the Respondent's plans to continue to do so, there was no mention of the Respondent's claimed fear of violence. Likewise, the owner of an agency that supplied replacement employees testified that when the Respondent instructed him that the hiring of replacements was to be kept "hush-hush," no mention was made of a fear of violence as the reason for that secrecy.

In sum, we reaffirm the judge's discrediting of Parker's testimony that the Respondent's secrecy was motivated by a fear of violence. See *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951) (the Board does not overrule a judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect).

The Additional Evidence Cited by the Second Circuit

As noted above, the Respondent urged the court to consider the following evidence in support of its claim that it had no unlawful motive in hiring the permanent replacements: (1) that it continued bargaining in good faith with the Union; (2) that it agreed to the Mayor of Hartford's request to stop hiring additional permanent replacements while he mediated the parties' labor dispute; and (3) that it solicited and followed the Union's advice on how best to recall strikers who had not been permanently replaced. See supra at 196 fn. 7. We find the Respondent's proffered evidence insufficient to refute the court's finding that the logical inference from the Respondent's secrecy was an illicit motive.

First, the Respondent's lawful conduct at the bargaining table is insufficient to negate the court's inference of an independent unlawful purpose behind the Respondent's secret hiring of permanent replacements. The Respondent's argument boils down to a suggestion that because it did not violate its duty to bargain under Section 8(a)(5), its unexplained secret hiring of permanent replacements could not have violated Section 8(a)(3). That argument fails as a matter of law and logic, and we reject it.

Similarly, the Respondent's agreement to a 10-day hiring moratorium while the Mayor of Hartford attempted to mediate the labor dispute is unavailing. The Respondent did not agree to the moratorium until almost 1 month *after* the Respondent commenced hiring permanent replacements and only after the Union had discovered that hiring and confronted the Respondent. By then, the Respondent had already permanently replaced more than half the bargaining unit.[7] In these circumstances, the Respondent's agreement to a brief moratorium cannot establish the absence of an improper motive with respect to its earlier hires.

Finally, the Respondent relies on the fact that, once the Union learned of the hiring and the strikers unconditionally offered to return to work, it solicited the Union's input on how best to recall strikers to available positions

"the decision to replace the strikers was motivated by an independent unlawful purpose." Supra at 1313 fn. 5.

[7] The Respondent admitted to the Union at the January 3, 2000 meeting that it had hired over 100 permanent replacement employees; the bargaining unit comprised about 180 employees.

and followed the Union's suggestions. Again, although evidence of lawful behavior with respect to the recall, those discussions occurred well after the replacement hiring. That recall cooperation does not support, let alone establish, that the Respondent had a lawful motive for its earlier secret hiring of permanent replacements.

Conclusion

We have carefully reviewed the evidence, including that brought to our attention by the Second Circuit and the Respondent, and find that it fails to establish that the Respondent did not possess an unlawful motive for its secret hiring of permanent replacements. We accordingly conclude, under the terms of the court's remand, that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate the permanently replaced economic strikers upon their unconditional offer to return to work.

ORDER

The National Labor Relations Board orders that the Respondent, Church Homes, Inc. d/b/a Avery Heights, Hartford, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to reinstate any employees engaged in a strike, upon their unconditional offer to return to work, where it is shown that the Respondent was motivated by an independent unlawful purpose in hiring permanent replacements for the striking employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer the employees who went on strike on November 17, 1999, and who have not yet been reinstated, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing, if necessary, any permanent replacements hired during the strike.

(b) Make whole the employees who went on strike on November 17, 1999, and who have not yet been reinstated, and the employees who may have been reinstated but whose reinstatement was delayed because a permanent replacement occupied their position on January 20, 2000, for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Within 14 days from the date of this Order, remove from its files any reference to its unlawful failure to reinstate the striking employees, and within 3 days thereafter notify them in writing that this has been done and that the unlawful failure to reinstate them will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Hartford, Connecticut, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 20, 2000.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 29, 2007

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Robert J. Battista, Chairman

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to reinstate any employees engaged in a strike, upon their unconditional offer to return to work, where it is shown that we were motivated by an independent unlawful purpose in hiring permanent replacements for the striking employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, within 14 days from the date of the Board's Order, offer the employees who went on strike on November 17, 1999, and who have not yet been reinstated, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing, if necessary any permanent replacements hired during the strike.

WE WILL make whole the employees who went on strike on November 17, 1999, and who have not yet been reinstated, and the employees who may have been reinstated but whose reinstatement was delayed because a permanent replacement occupied their position on January 20, 2000, for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful failure to reinstate the striking employees, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the unlawful failure to reinstate will not be used against them in any way.

CHURCH HOMES, INC. D/B/A AVERY HEIGHTS